Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

SUSAN RADECKI, Individually and as Personal Representative of the Estate of Chester A. Radecki, Deceased, KRISTIN RADECKI, KERRY RADECKI, RENEE RADECKI and ROBERT RADECKI,

Petitioners,

v.

RON BARELA, personally and in his official capacity, and BENJIE MONTANO, personally and in his official capacity,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a police officer violate the Fourteenth Amendment's guarantee of substantive due process if he commands an innocent bystander to rescue him from a dangerous situation and then abandons the bystander to protect himself, leaving the bystander to be killed by a dangerous criminal to whom the officer has surrendered his weapon?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings in the court below are named in the caption of the case. Respondent Ron Barela is named individually and in his official capacity as a Deputy Sheriff employed by the Santa Fe County Sheriff's Department, Santa Fe, New Mexico. Mr. Barela is no longer employed by the Santa Fe County Sheriff's Department. Respondent Benjie Montano is named individually and in his official capacity as Santa Fe County Sheriff.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled action on June 24, 1998.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Tenth Circuit, entered on June 24, 1998, is reported at 146 F.3d 1227, and is reprinted in the Appendix hereto at pages 1 through 13. The Order and Memorandum Opinion of the District Court for the District of New Mexico, entered on November 18, 1996, is reported at 945 F.Supp. 226, and is reprinted in the Appendix at pages 14 through 28.

BASIS FOR JURISDICTION

The Judgment and Opinion of the Court of Appeals was entered on June 24, 1998. On July 9, 1998, Petitioners filed a Petition For Rehearing With Suggestion For Rehearing En Banc. On July 28, 1998, the Court of Appeals entered an Order denying Petitioners' Petition For Rehearing. App. at 40-41. This petition for writ is filed on October 26, 1998, within 90 days of July 28, 1998. *See* Sup. Ct. R. 13.3, 30. This Court has jurisdiction to review the final judgment of the Court of Appeals for the Tenth Circuit under 28 U.S.C. § 1254(1).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

This case involves application of 42 U.S.C. § 1983, which states, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

App. at 42.

This case also involves application and interpretation of Section 1 of the Fourteenth Amendment to the United States Constitution, which states, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

App. at 43-44.

STATEMENT OF THE CASE

A. Background.

In this case, a District Court found that a law enforcement officer violated substantive due process by ordering an innocent bystander to rescue him from a dangerous situation and then abandoning the bystander to save himself, leaving the bystander to be killed by a dangerous criminal to whom the officer had surrendered his weapon. The District Court found the officer's conduct "despotic and tyrannical" and shocking to the conscience. Relying on this Court's holding in *County of Sacramento v. Lewis*, ___ U.S. ___, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), the Court of Appeals reversed the District Court's decision on the grounds that the officer confronted an "emergency situation" and did not specifically intend to cause the innocent bystander harm when he ordered him into the fray. The Court of Appeals' decision represents a wholesale abandonment of substantive due process inquiry with respect to street-level law enforcement, contrary to this Court's decisions recognizing the right to be free from harmful state action that is arbitrary in the constitutional sense and therefore conscience-shocking. The Court of Appeals' decision also conflicts with decisions of this Court and other circuits that impose a due process duty to protect those whom the state has intentionally placed in a position of known danger or knowingly prevented from taking action to protect themselves.

B. Facts.

Some time after 3:00 a.m. on August 8, 1992, Chester Radecki ("Radecki") was awakened by the sound of a

woman screaming. Radecki looked out his window and heard more screams which sounded like someone was being raped or hurt. He also heard the sound of someone walking around in the arroyo just below his bedroom window. At approximately the same time, Radecki noticed that a law enforcement vehicle had arrived with its emergency lights flashing. Radecki drove to the scene to report what he had heard.

Respondent Ron Barela ("Barela") was on duty as a Santa Fe County Deputy Sheriff. Barela had arrived at the scene and noticed a motorcycle lying on the side of the road. Barela contacted his dispatcher to obtain information regarding the motorcycle. Shortly thereafter, a tow truck driven by Eric Trujillo ("Trujillo") stopped at the scene. Searching with his flashlight, Barela detected a man whom he knew from prior law enforcement experience to be Daniel Martinez ("Martinez") coming out from behind some bushes and staggering towards him.

Martinez told Barela and Trujillo that his girlfriend had run him off the road, causing him to crash. As Barela, Trujillo and Martinez talked about the situation, Barela noticed that Martinez appeared to be intoxicated. Though he now knew that Martinez had been driving while intoxicated and knew that a law enforcement officer should not allow an intoxicated subject to wander around unrestrained, Barela failed to search Martinez, restrain him, cite him or arrest him. Instead, Barela allowed Martinez to walk alongside him while he looked around the area.

When Radecki arrived at the scene, dressed in his robe and carrying a flashlight, he told Barela that he lived in the neighborhood and had heard screams which

sounded like someone being raped. Despite this additional information, Barela still failed to restrain Martinez. Now accompanied by Radecki, Barela continued to look around the scene and allowed Martinez to walk behind him. As Barela shined his flashlight on a car in the bushes, Martinez tried to grab Barela's service weapon – a 9 mm Smith & Wesson semiautomatic pistol carrying 15 rounds. Barela and Martinez then wrestled for control of the weapon.

Barela then ordered Radecki, an untrained and unarmed civilian, to strike Martinez with his flashlight, thus involving him in an extremely dangerous law enforcement action and affirmatively creating and/or increasing the risk that Radecki would be hurt by Martinez, who Barela now knew to be a dangerous criminal.[1] Radecki responded by striking Martinez in the head with the flashlight.

Though he had been trained always to strive to retain his weapon, Barela surrendered his weapon to Martinez. Though he had a baton on his belt, had a shotgun in his car and had been trained to subdue armed suspects even when unarmed himself, Barela ran away in the opposite direction of his car and hid in the bushes, leaving Radecki defenseless against a now-armed criminal. Using Barela's

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[1] Under NMSA 1978, § 30-22-2 (1963), App. at 45, it is a petty misdemeanor to "[r]efus[e] to assist any peace officer in the preservation of the peace when called upon by such officer in the name of the United States or the State of New Mexico." Thus, under state law, Radecki had a legal obligation to comply with Barela's command.

weapon, Martinez turned on Radecki and fatally shot him.

C. Proceedings Below.

Radecki's wife and children commenced this action against Barela and Respondent Benjie Montano, the Santa Fe County Sheriff, under 42 U.S.C. § 1983, alleging that Barela violated Radecki's substantive due process rights under the Fourteenth Amendment by ordering Radecki to intervene in the struggle over Barela's weapon, then surrendering the weapon and fleeing the scene, allowing Radecki to be shot and killed.[2] The Complaint premised these claims upon two theories: first, Barela created a special relationship with Radecki when he restrained Radecki's freedom to act on his own behalf; and second, Barela created a special relationship with Radecki when he consciously created or enhanced the risk that Radecki would be harmed by Martinez. The Complaint further alleged that Barela's conduct was intentional and shocking to the conscience.

The Complaint was filed in the First Judicial District Court for the County of Santa Fe, State of New Mexico, and Respondents removed the case to the United States

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[2] The claims against Respondent Montano are based on his supervisory liability and his embodiment of the governmental entity whose customs and policies permitted or condoned Barela's actions. Although Montano also moved for summary judgment, the District Court has held his motion in abeyance pending resolution of the claims against Barela.

District Court for the District of New Mexico pursuant to 28 U.S.C. § 1446.[3]

Respondents filed a joint Motion for Partial Summary Judgment asserting qualified immunity. In an Order entered on August 4, 1994, App. at 37-38, the District Court denied Respondents' motion insofar as it related to their assertion of qualified immunity, finding that Petitioners had alleged the violation of a right that was clearly established and that a genuine dispute of material fact existed as to whether Barela acted with the degree of culpability that results in a violation of substantive due process. Respondents appealed, and, on February 16, 1996, the Court of Appeals for the Tenth Circuit vacated the District Court order denying Respondents' motion and remanded the case to the District Court to reconsider its decision in light of *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995), *cert. denied*, 516 U.S. 1118, 116 S.Ct. 924, 133 L.Ed.2d 856 (1996), which held that a substantive due process claim arises only when state action "shocks the conscience" of the court. *Radecki v. Barela*, 77 F.3d 493 (10th Cir. 1996) (table) (text in Westlaw at 1996 WL 67181), App. at 29-36.

On November 15, 1996, the District Court issued an Order and Memorandum Opinion again denying Respondents' motion for summary judgment. *Radecki v. Barela*, 945 F.Supp. 226 (D.N.M. 1996), App. at 14-28. Respondents again appealed, and on June 24, 1998, the Court of Appeals reversed the decision of the District Court and

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[3] The District Court had subject matter jurisdiction under 28 U.S.C. § 1331.

remanded the case for entry of judgment in favor of Respondents. App. at 1-13. On July 9, 1998, Petitioners filed a Petition For Rehearing With Suggestion For Rehearing En Banc. On July 28, 1998, the Court of Appeals entered an Order denying Petitioners' Petition For Rehearing. App. at 40-41.

REASONS FOR GRANTING THE WRIT

In finding that the police conduct in this case was "despotic and tyrannical" and therefore conscience-shocking, the District Court said as follows:

> A police officer has a duty to protect people, not vice versa. No police officer should command a citizen to rescue him from a dangerous situation, thereby putting the citizen's life at risk, and then abandon the citizen to save himself, thereby sacrificing the citizen to seek safety for himself. . . . I believe any enlightened person in a civilized society which employs police protection would reach this conclusion. Therefore, Plaintiffs' allegations rise to the level of [a] substantive due process claim . . . and I conclude, as a matter of law, that Defendant Barela's conduct as a whole shocks the conscience.
>
> 945 F.Supp. at 231, App. at 25.

At issue, in light of the Court of Appeals' reversal of the District Court's decision, is the ability of courts, under the rubric of substantive due process articulated by this Court for forty-six years, to hold police officers accountable for harm caused by intentionally placing innocent civilians in harm's way in a manner contrary to

this country's legal traditions. These traditions recognize a citizen's right to be free from arbitrary state action that intentionally creates or increases the risk of that he will be harmed or prohibits the citizen from acting to protect himself.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THIS COURT RECOGNIZING A CAUSE OF ACTION FOR VIOLATION OF SUBSTANTIVE DUE PROCESS WHERE AN INDIVIDUAL IS INJURED AS A RESULT OF STATE ACTION THAT IS ARBITRARY IN THE CONSTITUTIONAL SENSE AND THEREFORE CONSCIENCE-SHOCKING.

Last term, this Court reaffirmed that an executive abuse of power violates substantive due process when it is arbitrary in the constitutional sense and so egregious and outrageous that it may fairly be said to "shock the contemporary conscience," a standard first articulated in *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952). *County of Sacramento v. Lewis*, ___ U.S. ___, 118 S.Ct. 1708, 1717 & n. 8, 140 L.Ed.2d 1043 (1998). As the *Lewis* Court said, that judgment "may be informed by a history of liberty protection" and "necessarily reflects an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them." *Id.*, 118 S.Ct. at 1717 n. 8. The "shocks the conscience" standard prevents the courts from using the Fourteenth Amendment as a "font of tort law to be superimposed upon whatever systems may already be administered by the States," *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1156, 1160-61, 47 L.Ed.2d 405

(1976), thus "supplanting traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U.S. 327, 332, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986).

Lewis held that whether a harmful state action is arbitrary in the constitutional sense and, therefore, conscience-shocking depends on the circumstances, so that recklessness or deliberate indifference that violates substantive due process in one context may not violate substantive due process in another context. As the Court said:

> Rules of due process are not . . . subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking. . . .
>
> *Id.*, 118 S.Ct. at 1718-19.

See also Armstrong v. Squadrito, 152 F.3d 564, 570 (7th Cir. 1998) ("[A]n investigation into substantive due process involves an appraisal of the totality of the circumstances rather than a formalistic examination of fixed elements.")

In its November 18, 1996 Memorandum Opinion and Order in this case, the District Court found that "[t]he presence of a loaded deadly weapon specifically put Mr. Radecki at obvious and substantial risk of serious, immediate, and proximate harm, which Defendant Barela must have known." 945 F.Supp. at 231, App. at 24. The Court also found that "Barela's instructions for Mr. Radecki to

engage in the struggle reflects an 'intent to place a person unreasonably at risk of harm.' " *Id.* (*citing Uhlrig*, 64 F.3d at 573). In addition, the Court concluded that "[o]nce Mr. Martinez gained possession of the gun, Defendant Barela recklessly acted in conscious disregard of this risk to Mr. Radecki when he abandoned Mr. Radecki and hid in the bushes." *Id.*

The District Court also made the following specific findings:

> Looking at the conduct of Defendant Barela as a whole, I conclude that his conduct created a special danger to Mr. Radecki, that such conduct was despotic and tyrannical, and therefore, conscience shocking. Defendant Barela's conduct is highly outrageous given the magnitude of harm he placed Mr. Radecki. A police officer has a duty to protect people, not vice versa. No police officer should command a citizen to rescue him from a dangerous situation, thereby putting the citizen's life at risk, and then abandon the citizen to save himself, thereby sacrificing the citizen to seek safety for himself. . . . I believe that any enlightened person in a civilized society which employs police protection would reach this conclusion. Therefore, Plaintiffs' allegations rise to the level of [a] substantive due process claim, . . . and I conclude, as a matter of law, that Defendant Barela's conduct as a whole shocks the conscience.
>
> 945 F.Supp. at 231, App. at 25.

In finding that Barela's conduct violated substantive due process, the District Court focused on the question of whether Barela's actions were "arbitrary," which the District Court took to mean "despotic and tyrannical." 945

F.Supp. at 230, App. at 22-23 (*citing Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) (finding that city's conduct could not "properly be characterized as arbitrary or conscience shocking, in a constitutional sense"); and *Black's Law Dictionary* 104 (6th ed. 1990).[4]

In reversing the District Court, the Court of Appeals said the courts, when examining state action in "those myriad situations involving law enforcement and governmental workers employed in emergency situations," 146 F.3d at 1230, App. at 9, are "no longer obliged to try to give meaning to the word 'arbitrary' as the district court tried to do." 146 F.3d at 1232, App. at 12. In its view, the courts have now moved away from determining whether a particular action is "arbitrary" in the constitutional sense, as this Court directed in *Collins*, and toward an inquiry into the official's opportunity for deliberation, 146 F.3d at 1231, App. at 10, so that, in those myriad situations where law enforcement officers act without deliberation, only a specific intent to cause harm gives rise to a substantive due process violation.

Yet, this Court repeatedly has said that the touchstone of due process is protection of the individual against arbitrary action of the government. *Lewis*, 118 S.Ct. at 1716; *Daniels*, 474 U.S. at 331, 106 S.Ct. at 665; *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976,

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[4] In a footnote, the District Court cited a detailed analysis of the synonymous use of "arbitrary" and "conscience-shocking" in the dissenting opinion of Circuit Judge Cowen in *Fagan v. City of Vineland*, 22 F.3d 1296, 1312 (3d Cir. 1994) (*en banc*) (Cowen, J., dissenting).

41 L.Ed.2d 935 (1974); *Collins*, 503 U.S. at 126-130 & n. 10, 112 S.Ct. at 1069-71 & n. 10. *See also Medeiros v. O'Connell*, 150 F.3d 164, 169-70 (2d Cir. 1998) ("The core of the concept of due process has always been an individual's freedom from arbitrary interference by the government."). In holding that Barela's conduct did not violate substantive due process simply because Barela was confronted with an "emergency" situation and did not specifically intend to harm Radecki, the Court of Appeals erroneously adopted a *per se*, rigid rule that conflicts with principles articulated in this Court's substantive due process decisions. Instead of making judgments "informed by a history of liberty protection" and "reflect[ing] an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them," *Lewis*, 118 S.Ct. at 1717 n. 8, the Court of Appeals' decision now directs the courts simply to assess the opportunity for deliberation, and, in the absence of such an opportunity, find a violation of substantive due process only where the state actor acts with specific intent to cause harm.

In *Lewis*, the Court held that an injury arising from a high-speed automobile pursuit of a suspect is not actionable unless the officer intended to inflict harm unrelated to the legitimate object of arrest. The Court did not focus exclusively on the opportunity for deliberation. Rather, the Court emphasized the substantial state interest in allowing the police to engage in a high-speed automobile pursuit of a suspect.

The concurring opinion filed by Justice Kennedy (and joined in by Justice O'Connor) in *Lewis* emphasizes the

narrowness of the Court's holding and the practical concerns motivating it:

> There is a real danger in announcing a rule, or suggesting a principle, that in some cases a suspect is free to ignore a lawful police command to stop. No matter how narrow its formulation, any suggestion that suspects may ignore a lawful command to stop and then sue for damages sustained in an ensuing chase might cause suspects to flee more often, increasing accidents of the kind which occurred here.[5]
>
> . . . **To decide this case, we need not attempt a comprehensive definition of the level of causal participation which renders a State or its officers liable for violating substantive commands of the Fourteenth Amendment.** It suffices to conclude that neither our legal traditions nor the present needs of law enforcement justify finding a due process violation when unintended injuries occur after the police pursue a suspect who disobeys their lawful order to stop.

Id., 118 S.Ct. at 1722 (emphasis added).

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[5] In a similar vein, Justice Scalia noted the following passage from *Mays v. City of East St. Louis*, 123 F.3d 999, 1003 (7th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 2059, 141 L.Ed.2d 137 (1998):

> Political society must consider not only the risks to passengers, pedestrians, and other drivers that high-speed chases engender, but also the fact that if police are forbidden to pursue, then many more suspects will flee – and successful flights not only reduce the number of crimes solved but also create their own risks for passengers and bystanders.

Lewis, 118 S.Ct. at 1726.

In directing the lower courts to abandon any attempt to determine arbitrariness with respect to conduct in "emergency" situations, the Court of Appeals prohibits those courts from making an assessment that is at the core of the substantive due process inquiry; *i.e.*, whether there is any substantial state interest in the conduct in question and whether finding a violation of substantive due process comports with our legal traditions and the present needs of law enforcement. Under the Court of Appeals' regime, a police officer can, as was done here, use an innocent bystander as a human shield to protect himself in a dangerous situation.

While the police may have a legitimate need to engage in high-speed automobile pursuits of fleeing suspects, the police have no legitimate need for authority to command a private, otherwise uninvolved citizen to assist in subduing a dangerous suspect during a struggle over possession of a firearm, and certainly no governmental interest is served in allowing the officer to then abandon him for the officer's benefit. While Barela initially may have had a legitimate need to investigate the crime scene, he had no legitimate need to order Radecki into the fray and then abandon him in the face of certain danger. The Court of Appeals' decision prohibits courts from taking these factors into consideration, as the District Court did.[6]

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[6] In *Medeiros*, the Court held that a state trooper's accidental shooting of a hostage in an attempt to apprehend the hostage-taker did not violate substantive due process. *See also Schaefer v. Goch*, 153 F.3d 793 (7th Cir. 1998) (same); *Moreland v. Las Vegas Metropolitan Police Dep't*, ___ F.3d ___ (9th Cir. Sept. 24, 1998) (1998 WL 652135) (*Lewis* "intent-to-harm" standard

The courts have never recognized a governmental interest in allowing a police officer to create a dangerous situation then flee the scene in order to protect himself at the expense of a private citizen he has thrown into the snake pit. *See Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (Posner, J.) ("If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.").[7] In the absence of any legitimate need to confer upon the police the authority to order civilian bystanders to rescue them in a dangerous situation or in allowing the police to then abandon that civilian in order to protect themselves, the outrageousness of Barela's conduct, the extent to which it violates

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controlled where it was alleged that police inadvertently shot bystander in attempt to apprehend participant in a gunfight). Again, the legitimate governmental interest in allowing a police officer to use deadly force to apprehend a dangerous suspect provides the point of departure from this case, as the government has no legitimate interest in allowing a police officer to conscript an innocent bystander into participating in the apprehension of a dangerous suspect and then abandon the bystander to protect himself.

[7] Unlike private citizens, police officers are paid to involve themselves in dangerous situations, they consciously assume the risks entailed in investigating crimes and apprehending criminals, and they are trained to deal with armed suspects and how to react during a struggle over a firearm. As the record in this case amply demonstrates, none of that training suggests that an officer should involve a private citizen in a struggle for a firearm, that an officer should ever surrender a firearm to a dangerous suspect, or that an officer should simply take flight once a dangerous suspect has gained possession of his firearm.

our traditions of freedom and the magnitude of the harm to which he subjected Radecki must be considered in determining whether his conduct violated substantive due process, in addition to considering whether he had a specific intent to cause Radecki to be injured. *See Stemler v. City of Florence*, 126 F.3d 856, 870 (6th Cir. 1997) ("The very notion that police officers should not have known that they could not force an incapacitated woman to drive off with an obviously drunk man who they had reason to believe had beaten her betrays a chilling and unacceptable vision of the role of the police in our society."), *cert. denied sub nom. City of Florence v. Chipman*, ___ U.S. ___, 118 S.Ct. 1796, 140 L.Ed.2d 936 (1998).

In addition, in holding that the police chase in *Lewis* did not rise to the level of a Fourteenth Amendment deprivation, the Court referred to the standard for determining whether a substantive due process violation has occurred in the prison riot context, which requires a showing that force was applied "maliciously and sadistically for the very purpose of causing harm." *Lewis*, 118 S.Ct. at 1719-20 (*quoting Whitley v. Albers*, 475 U.S. 312, 320, 106 S. Ct. 1078, 1085, 89 L. Ed. 2d 251 (1986)). In so doing, the Court described a continuum of misconduct in which the reckless police chase constitutes "mid-level fault" that, in that context, does not implicate "the larger concerns of the governors and the governed." *Lewis*, 118 S.Ct. at 1720 (*quoting Daniels v. Williams*, 474 U.S. at 332, 106 S. Ct. at 665).

In locating where a particular harmful state action falls on this continuum of misconduct, the courts must consider whether there is any substantial governmental

interest in that conduct. Where, as here, a law enforcement officer commands an innocent bystander to rescue him from a dangerous situation and then abandons the bystander to save himself, the court must consider whether the state has any legitimate need to allow law enforcement officers to engage in that conduct. In the absence of any legitimate need to allow law enforcement officers to engage in such conduct, something more than "mid-level" fault may be ascribed, notwithstanding the absence of a specific intent to harm, so that the conduct implicates the larger concerns of the governors and the governed. As the District Court noted in its opinion, a police officer has a duty to protect people, not vice versa. *Radecki*, 945 F.Supp. at 230, App. at 25. By eliminating any inquiry into whether police officers are, or should be, entitled to intentionally place a bystander's life at risk solely to protect their own, the Court of Appeals' decision departs drastically from this part of our tradition.

For these reasons, the Court must further elucidate the substantive due process continuum to require lower courts to inquire into the law enforcement purpose or countervailing public interest served by particular police conduct before concluding that harm caused by that conduct does not constitute a denial of substantive due process.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS RECOGNIZING A CAUSE OF ACTION BASED ON A SUBSTANTIVE DUE PROCESS DUTY TO PROTECT THOSE WHOM THE STATE HAS KNOWINGLY PLACED IN A POSITION OF DANGER OR DEPRIVED OF THE FREEDOM TO PROTECT THEMSELVES.

In *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), this Court said the state may have a duty to protect an individual from harm where the state has created or assumed a relationship with respect to a particular individual, such as in an institutional or custodial setting, by restricting the individual's ability to care for himself. *Id.*, 489 U.S. 198-200, 109 S.Ct. at 1004-06.

As the *DeShaney* Court said:

> . . . When the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – *e.g.*, food, clothing, shelter, medical care, and **reasonable safety** – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises . . . from the limitation which [the State] has imposed on his freedom to act on his own behalf. . . . In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, **or other similar restraint of personal liberty** – which is the "deprivation of liberty"

> triggering the protections of the Due Process Clause. . . .
>
> *Id.*, 489 U.S. at 200, 109 S.Ct. at 1005-06 (*citations and footnote omitted*) (*emphasis added*).

See also Stemler, 126 F.3d at 870 ("In cases such as this one, where the plaintiff suffered injury as a result of being placed in the state's custody, it has consistently and uncontroversially been the rule that a constitutional claim arises where the injury occurred as a result of the state's deliberate indifference to the risk of such an injury.").

A non-custodial "special relationship" exists when the state is aware that an individual faces a certain danger and takes action that makes the individual more vulnerable to the danger and, by doing so, places him in a worse position than he would have been in had the state not acted at all. *DeShaney*, 489 U.S. at 201. *See also Cornelius v. Town of Highland Lake*, 880 F.2d 348, 359 (11th Cir. 1989) (where defendants placed plaintiff in a "unique position of danger," they owed her a duty to protect her from the risk of harm they created), *cert. denied*, 494 U.S. 1066, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990); *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990) (constitutional duty to protect exists if the state has taken affirmative action that increases the danger of, or vulnerability to, violence beyond the level at which it would have been absent state action).

Thus, where an individual is in custody or the state actor has placed the individual in a position of danger, the state assumes a greater duty to protect that person from harm, including harm caused by third parties. *See Bowers*, 686 F.2d at 618; *Bryson v. City of Edmond*, 905 F.2d

1386, 1393 (10th Cir. 1990) (noting the distinction between situations in which the state actor neither played a part in the creation of the risk nor did anything to render the victim more vulnerable to harm, as compared to those cases in which the state actor created or enhanced the risk of harm to the victim); *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992), *cert. denied*, 508 U.S. 951, 113 S.Ct. 2442, 124 L.Ed.2d 660 (1993) (due process duty to protect arises from affirmative conduct on the part of a governmental actor placing the plaintiff in danger); *Pinder v. Johnson*, 54 F.3d 1169, 1177 (4th Cir. 1995) (*en banc*) ("When the state itself creates the dangerous situation that resulted in a victim's injury, . . . the state is not merely accused of a failure to act; it becomes much more akin to an actor itself directly causing harm to the injured party."), *cert. denied*, 516 U.S. 994, 116 S.Ct. 530, 133 L.Ed.2d 436 (1995); *Kneipp v. Tedder*, 95 F.3d 1199, 1205 (3d Cir. 1996) (citing cases).

Under the state-created danger doctrine, a police officer violates an individual's substantive due process rights when he or she creates or enhances the risk that the individual will be harmed by a third party. *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) (police officer liable under § 1983 for recklessly leaving driver alone and on foot in a high crime area where she was raped), *cert. denied*, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990); *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (officers liable for arresting the driver of a vehicle and leaving young children stranded on the roadway); *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277 (6th Cir. 1987) (*en banc*) (sheriff's department liable where plaintiff's decedent was pulled over by an inmate using a fully-equipped, clearly marked patrol car given to him by

sheriff's deputies, despite warnings that he was using the car to stop vehicles on the roadway).

In *Stemler*, the court reversed a district court order dismissing a complaint where the plaintiff alleged that police officers violated a woman's substantive due process rights when they forcibly removed her from a car in which she was riding and placed her in a truck driven by her abusive, intoxicated boyfriend, who wrecked shortly thereafter, killing her. As the *Stemler* court noted, holding the police liable for harm caused by their deliberate indifference to persons whom they have taken into custody "ensures that injuries arising out of truly arbitrary governmental action are compensated, while at the same time avoiding the imposition on the states of a broad, federalized system of tort law." *Id.*, 126 F.3d at 870.

Similarly, in his concurring opinion in *Lewis*, Justice Scalia describes how the nation's history, legal traditions and practices support the notion that the state assumes an obligation to protect those whom it has taken into custody and thereby prevented from protecting themselves. *Id.*, 118 S.Ct. 1724-25. Thus, in deciding whether substantive due process is violated by something other than a specific intent to cause harm, the courts must consider whether the state actor has assumed a duty to protect the individual by taking action that the state actor knows will prevent the individual from protecting himself against a substantial risk of harm. Where the state actor commands an innocent bystander to rescue him from a dangerous situation and abandons the bystander to protect himself, he should not be heard to say that the dangerous situation excuses him from the duty to protect the bystander.

The Court of Appeals' decision precludes any such consideration, and therefore contravenes the well settled principle that substantive due process is implicated in such contexts.

III. CONCLUSION

For the foregoing reasons, Petitioner respectfully urges this Court to grant the writ and to review the Opinion and Order of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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October 26, 1998

Susan RADECKI, Individually and as personal representative of the Estate of Chester A. Radecki, Deceased, Kristin Radecki; Kerry Radecki; Renee Radecki; and Robert Radecki, Plaintiffs – Appellees,

v.

Ron BARELA, personally and in his official capacity; Benjie Montano, personally and in his official capacity, Defendants – Appellants.

No. 96-2297.

United States Court of Appeals,
Tenth Circuit.

June 24, 1998.

Joseph F. Canepa, Canepa, Vidal & Fitzgerald, P.A., Santa Fe, NM (Martin Esquivel, Dines, Gross & Wilson, P.C., Albuquerque, NM, with him on the briefs), appearing for Defendants-Appellants.

Robert R. Rothstein, Rothstein, Donatelli, Hughes, Dahlstrom, Cron & Shoenburg, LLP, Santa Fe, NM, appearing for Plaintiffs-Appellees.

Before TACHA, McWILLIAMS, and BALDOCK, Circuit Judges.

TACHA, Circuit Judge.

At issue in this appeal is whether the district court erred in denying Defendant Ron Barela's summary judgment motion based on qualified immunity in this action brought against him under 42 U.S.C. § 1983. Plaintiffs are Chester A. Radecki's survivors. Defendant is a Santa Fe County, New Mexico Deputy Sheriff. Plaintiffs alleged that Deputy Barela violated Mr. Radecki's Fourteenth Amendment right to due process of law by creating a

dangerous situation that resulted in Mr. Radecki's death. Deputy Barela moved for summary judgment on the basis of qualified immunity, and the district court denied his motion. We exercise jurisdiction under 28 U.S.C. § 1291. In light of the Supreme Court's recent articulation in *County of Sacramento v. Lewis*, ___ U.S. ___, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), of the degree of culpability necessary to sustain a substantive due process claim in a case such as this, we reverse.

I. *Background*

The facts of this case are tragic. At approximately 3:00 a.m. on August 8, 1992, Mr. Radecki awoke to the sound of a woman screaming outside his bedroom window in Santa Fe, New Mexico. He looked out the window and heard more screaming and the sound of someone walking around outside. Shortly thereafter, Deputy Barela arrived nearby in a police car with lights flashing. Mr. Radecki left his home, got in his car, and drove to the scene.

When Deputy Barela arrived on the scene, a motorcycle lay on the side of the road. Eric Trujillo drove up in a tow truck. Deputy Barela detected a man in the bushes, and with his flashlight recognized him as Daniel Martinez. Martinez staggered out of the bushes. Martinez, who appeared to be intoxicated, told Deputy Barela and Trujillo that his girlfriend had run him off the road, causing him to wreck. Deputy Barela began to look around the area for other vehicles or injured persons.

Mr. Radecki arrived in a robe carrying a flashlight. He told Deputy Barela that he lived nearby, and that he

had heard screams, as if a woman were being raped. Deputy Barela and Radecki explored the scene with their flashlights, with Martinez close behind. When Deputy Barela shined his flashlight on a car in the bushes, Martinez tried to grab Deputy Barela's nine millimeter semi-automatic pistol. The two men wrestled for control of the gun. Deputy Barela yelled to Radecki, "Hit him with your flashlight. Hit him. Get him off me."

It is unclear whether Radecki hit Martinez with his flashlight. In response to Deputy Barela's command, however, Radecki approached the struggling pair. At that point, Martinez wrested the gun away from Deputy Barela, who then fled to the bushes. Martinez turned and shot Radecki in the chest, killing him.

Plaintiffs brought suit against Deputy Barela under 42 U.S.C. § 1983. They alleged that he violated Mr. Radecki's substantive due process rights under the Fourteenth Amendment. They specifically asserted that Deputy Barela violated the Constitution by increasing Radecki's vulnerability to harm by a third party when Deputy Barela ordered Radecki to intervene in the struggle over the gun, surrendered the gun to Martinez, and ran and hid in the bushes when Martinez gained control of the gun. In the early stages of this case, Deputy Barela moved unsuccessfully for summary judgment based on qualified immunity.

Qualified immunity protects government officials from individual liability in a section 1983 action unless the officials violated clearly established constitutional rights. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). When a defendant pleads

qualified immunity, the plaintiff must then make a two-part showing. *See Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir.1995). "First, the plaintiff must demonstrate that the defendant's actions violated a constitutional or statutory right." *Id.* "Second, the plaintiff must show that the constitutional or statutory rights the defendant allegedly violated were clearly established at the time of the conduct at issue." *Id.*

We previously entertained Deputy Barela's appeal from the denial of his motion for summary judgment on grounds of qualified immunity. *See Radecki v. Barela*, 77 F.3d 493 (10th Cir.1996) (unpublished table decision). In that decision, we remanded so that the district court could consider whether Plaintiffs had alleged conduct amounting to a constitutional violation in light of our decision in *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir.1995), *cert. denied*, 516 U.S. 1118, 116 S.Ct. 924, 133 L.Ed.2d 853 (1996). In *Uhlrig*, we held that in order for a plaintiff to prevail on a substantive due process claim against an individual police officer, she must demonstrate that the officer acted in a manner that "shocks the conscience." *Id.* at 571. Upon remand, the district court held that Plaintiffs did allege facts that Deputy Barela's conduct shocks the conscience. The district court further held that our decision in *Medina v. City and County of Denver*, 960 F.2d 1493 (10th Cir.1992), clearly established that Deputy Barela's conduct was unconstitutional. Thus, the district court again denied qualified immunity to Deputy Barela. Deputy Barela again appeals.

II. *Standard of Review*

"We review the district court's denial of qualified immunity on summary judgment de novo." *Romero v. Fay*, 45 F.3d 1472, 1475 (10th Cir.1995). As with other summary judgment appeals, we review the evidence in the light most favorable to the nonmoving party. *See id.* When we review summary judgment decisions involving a qualified immunity defense, however, our review is somewhat different than other summary judgment rulings. We follow the analytical framework that the Supreme Court established in *Siegert v. Gilley*, 500 U.S. 226, 231-33, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991). *See Romero*, 45 F.3d at 1475.

Siegert established that a district court's first task in evaluating a defendant's assertion of qualified immunity is to determine whether the plaintiff has alleged the violation of a constitutional right at all. *See id.* at 231-32, 111 S.Ct. 1789; *Romero*, 45 F.3d at 1475. "Normally, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question." *County of Sacramento v. Lewis*, 118 S.Ct. at 1713-14 n. 5. Whether a plaintiff has alleged conduct by a defendant that violates the Constitution and whether that prior law clearly prohibited the defendant's conduct are questions of law that we review de novo. *See Romero*, 45 F.3d at 1475.

III. *Discussion*

Section one of the Civil Rights Act of 1871, 42 U.S.C. § 1983, provides a remedy against any person who, under color of state law, deprives another of rights protected by

the Constitution. *See Collins v. City of Harker Heights*, 503 U.S. 115, 120, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). Plaintiffs' section 1983 claim rests on the Due Process Clause of the Fourteenth Amendment, which states: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Plaintiffs do not assert that Deputy Barela violated the procedural component of the Clause; rather, they rely on its substantive component "that protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.' " *Collins*, 503 U.S. at 125, 112 S.Ct. 1061 (citing *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986)). Plaintiffs specifically assert that Deputy Barela violated the Constitution by creating the danger that resulted in Radecki's death. In accordance with the *Seigert* framework, we must first determine whether, viewing the evidence in the light most favorable to the plaintiff, Deputy Barela committed a constitutional violation.

In *Uhlrig*, this Circuit articulated the standard for judging whether a governmental officer's actions violate the substantive component of the Due Process Clause. *See Uhlrig*, 64 F.3d at 573. Relying on the Supreme Court's enunciation of the standard in *Collins*, in which the Supreme Court equated arbitrary state conduct with state conduct that "shocks the conscience," we made clear that in order to prevail on a substantive due process claim such as the one asserted here, the plaintiff must demonstrate that the defendant acted in a manner that shocks the conscience. *Id.* (citing *Collins*, 503 U.S. at 126, 112 S.Ct.

1061). We were compelled to acknowledge in *Uhlrig*, however, that the level of culpability that must be shown under the "shocks the conscience" standard is difficult to define. In an effort to guide our analysis of whether particular conduct "shocks the conscience," we emphasized the importance of three basic principles highlighted by the Supreme Court in evaluating substantive due process claims: "(1) the need for restraint in defining their scope, (2) the concern that § 1983 not replace state tort law, and (3) the need for deference to local policymaking bodies in making decisions impacting upon public safety." *Uhlrig*, 64 F.3d at 573 (citations omitted). In a case decided this term, the Supreme Court has relied on these three basic principles and clarified the degree of culpability required to meet the conscience-shocking standard. *See County of Sacramento v. Lewis*, ___ U.S. ___, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). That decision controls this case.

Lewis addressed whether a police officer engages in conduct that shocks the conscience, thereby violating substantive due process, "by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender." *Lewis*, 118 S.Ct. at 1711-12. In *Lewis*, the defendant officer, driving a patrol car, pursued a motorcycle through a residential neighborhood for 75 seconds at speeds up to 100 miles per hour, covering a distance of 1.3 miles. The only violation that the motorcyclist apparently had committed was driving at a high rate of speed. The chase ended after the motorcycle fell over while turning. The patrol car struck the motorcycle passenger, killing him. The victim's family brought a section 1983

claim against the officer, the county, and the sheriff's office, alleging a substantive due process deprivation. The Ninth Circuit held that the degree of fault necessary to state a constitutional claim in high-speed police chases is deliberate indifference to, or reckless disregard for, another's right to life and personal security. *See Lewis v. County of Sacramento*, 98 F.3d 434, 441 (9th Cir.1996). The Supreme Court unanimously rejected the Ninth Circuit's use of the deliberate indifference standard in the context of high-speed chases, holding that under the circumstances presented "only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." *Lewis*, 118 S.Ct. at 1711-12.

It is important to be precise about the conduct that is at issue in this case and why *Lewis* controls it. In *Lewis*, the defendant officer himself inflicted the harm on the victim. In this case, the harm to Mr. Radecki was ultimately caused by a private third party (Martinez). Nevertheless, the conduct complained of was that of Deputy Barela, and the pivotal question is whether the officer's conduct resulted in a constitutional deprivation. Our analysis does not change simply because a private third party inflicted the harm.

It is true, of course, that "state actors are generally only liable under the Due Process Clause for their own acts and not private violence." *Uhlrig*, 64 F.3d at 572. There are, however, two exceptions to that rule. First, the state may be subject to constitutional liability if it does not perform a duty to provide protection to an individual with whom the state has a special relationship because it

has assumed control over that individual, such as in a prison. *See id.* at 572. Second, the state may be constitutionally liable if it creates a danger that results in harm to an individual, even if that harm is ultimately inflicted by a private party. *See id.* The "shocks the conscience" standard applies to both types of suits. *See id.* at 572-73.

Plaintiffs here seek recovery under a "danger creation" theory. They contend that the constitutional violation arose from Deputy Barela's decision to involve a bystander, Radecki, in the dangerous struggle for the gun, and then to abandon him once Martinez had gained control of the firearm. *Lewis* speaks directly to the degree of culpability required to shock the conscience under these circumstances.

The Supreme Court in *Lewis* builds upon the three principles that we articulated in *Uhlrig* and translates them into a sound framework, grounded in common sense, for analyzing those myriad situations involving law enforcement and governmental workers deployed in emergency situations. *Lewis* rejects again any tendency to equate constitutional liability with tort liability. More importantly, however, the *Lewis* opinion underscores the need for deference to local officials making decisions in emergency situations. The Court first reiterates the important principle that rejects "the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct" and holds "that the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Lewis*, 118 S.Ct. at 1718. The Court then observes that conscience-shocking behavior is most likely to be

found "at the other end of the culpability spectrum" – that is, where there is an intent to do harm that is not justified by any government interest. *Id.* The Court next specifically recognizes that in the middle range of the culpability spectrum, where the conduct is more than negligent but less than intentional, there may be some conduct that is egregious enough to state a substantive due process claim. *See id.* 118 S.Ct. at 1718-19. Within this middle range, *Lewis* directs us to analyze the level of culpability by examining the circumstances that surround the conduct at issue and the governmental interest at stake.

Instead of defining conscience-shocking conduct by expounding on the meaning of "arbitrary" conduct, as *Collins* directs (and as the district court did), *Lewis* points our inquiry to the official's opportunity for deliberation and in doing so draws important analogies to the Eighth Amendment prison context. *See id.* 118 S.Ct. at 1718-20 (citing, among others, *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986); *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983); and *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). Attention to the marked differences between, for instance, a normal custodial situation in a prison and a violent disturbance in a prison "shows why the deliberate indifference that shocks in the one case is less egregious in the other." *Id.* 118 S.Ct. at 1719. We are directed to employ the "deliberate indifference" standard only when actual deliberation is practical. *Id.* In the custodial situation of a prison, actual deliberation is not only possible but required in those matters that affect an inmate's general well-being, such as

medical care, proper exercise, and adequate nutrition. These are matters about which public officials must make policy decisions with careful attention to their special relationship to those in custody – and about which they have the luxury of prolonged consideration. *Lewis* contrasts those deliberative policy judgments with decisions that prison officials must make during a riot. Deliberate indifference does not suffice for constitutional liability under the Eighth Amendment "when a prisoner's claim arises not from normal custody but from response to a violent disturbance." *Id.* 118 S.Ct. at 1719.

The Court directly analogizes the level of culpability required for an Eighth Amendment violation in the prison context to the level required for substantive due process liability, instructing that the analysis rests upon:

> the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations. When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking. But when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates "the large concerns of the governors and the governed."

Id. 118 S.Ct. at 1720 (quoting *Daniels v. Williams*, 474 U.S. 327, 332, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986)). *Lewis* specifically analogizes a prison official's response in a riot situation to a police officer's conduct in a high speed chase. Both situations require the officer's instant judgment, and accordingly, no substantive due process claim

can lie unless the defendant official's conduct was unjustified by any government interest and was "tainted by an improper or malicious motive." *Id.* 118 S.Ct. at 1721.

Therefore, in assessing the constitutionality of law enforcement actions, we now distinguish between emergency action and actions taken after opportunity for reflection. Appropriately, we are required to give great deference to the decisions that necessarily occur in emergency situations. In the many cases that involve "lawless behavior for which the police were not to blame," *id.*, we are no longer obliged to try to give meaning to the word "arbitrary" as the district court tried to do.

Henceforth, we look to the nature of the official conduct on the spectrum of culpability that has tort liability at one end. On the opposite, far side of that spectrum is conduct in which the government official intended to cause harm and in which the state lacks any justifiable interest. In emergency situations, only conduct that reaches that far point will shock the conscience and result in constitutional liability. Where the state actor has the luxury to truly deliberate about the decisions he or she is making, something less than unjustifiable intent to harm, such as calculated indifference, may suffice to shock the conscience.

Applying the standard thus enunciated in *Lewis*, the result in this case is clear. Deputy Barela was confronted with a suddenly explosive law enforcement situation when Martinez tried to seize Barela's gun with Radecki present. Deputy Barela had no time for deliberation. The undisputed facts in this record make clear that Deputy

Barela was confronted with the kind of instantaneous judgment call that is so often required of law enforcement personnel, prison officials, and many other government actors called to emergency situations. Sometimes these decisions are negligent, sometimes they are even reckless, sometimes indifferent. Under these circumstances, however, where Plaintiffs have not even alleged that Deputy Barela acted with an intent to harm the participants or to worsen their legal plight, under the *Lewis* standard there is no constitutional liability.

As the Supreme Court found in *Lewis*, regardless of whether Deputy Barela's behavior "offended the reasonableness held up by tort law or the balance struck in law enforcement's own codes of sound practice, it does not shock the conscience, and petitioners are not called upon to answer for it under § 1983." *Lewis*, 118 S.Ct. at 1721. There being no constitutional violation, the plaintiffs cannot sustain the first of the two-part showing required to rebut the defendant's assertion of qualified immunity.

The order denying summary judgment is reversed and the case is remanded for entry of judgment in favor of the defendants.

Susan RADECKI, Individually and as Personal Representative of the Estate of Chester A. Radecki, Deceased, Kristin Radecki, Kerry Radecki, Renee Radecki and Robert Radecki, Plaintiffs,

v.

Ron BARELA, Personally and in His Official Capacity, Benjie Montano, Personally and in His Official Capacity, Defendants.

No. CIV 93-1488 LH/DJS.

United States District Court, D. New Mexico.

Nov. 15, 1996.

Robert R. Rothstein, Rothstein, Donatelli, Hughes, Dahlstrom, Cron & Schoenburg, Santa Fe, NM, for Plaintiffs.

Martin R. Esquivel, Dines, Wilson & Gross, Albuquerque, NM, for Defendant Barela.

Joseph F. Canepa, Brian E. Fitzgerald, Canepa, Vidal, Fitzgerald & Bell, Santa Fe, NM, for Defendant Montano.

MEMORANDUM OPINION

HANSEN, District Judge.

THIS MATTER comes before the Court on remand from the Tenth Circuit Court of Appeals pursuant to an unpublished Order and Judgment entered by that Court on February 16, 1996. The Order and Judgment ordered this Court to: (1) vacate its August 3, 1994, Order denying

Defendant Barela qualified immunity, [1] and (2) consider whether Plaintiff Radecki has alleged conduct or presented genuine issues of material fact as to conduct constituting a constitutional violation under *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 924, 133 L.Ed.2d 853 (1996). The Circuit Court also permitted the parties to supplement the record with material bearing on the issue of whether Defendant Barela's alleged conduct "shocks the conscience" of the Court. Having reviewed the simultaneous supplemental memoranda of the parties, and having considered the applicable law in light of *Uhlrig v. Harder*, the Court finds, as explained below, that Defendants' Motion for Partial Summary Judgment based upon their defense of qualified immunity from suit (Docket No. 27) is not well taken and shall be denied.

BACKGROUND

I. Procedural Background

Plaintiff Susan Radecki, appearing as personal representative of the Estate of Chester A. Radecki, filed this action against Defendant Barela under 42 U.S.C. § 1983. Plaintiff alleged, *inter alia*, that Defendant Barela violated Mr. Radecki's Fourteenth Amendment right to substantive due process by recklessly creating the dangerous situation that culminated in Mr. Radecki's death. Specifically, Plaintiff alleged that Defendant Barela violated

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[1] An Order vacating the August 3, 1994, Order shall be entered contemporaneously with this Memorandum Opinion.

Mr. Radecki's substantive due process rights by increasing Mr. Radecki's vulnerability to harm by a third party when Defendant Barela ordered Mr. Radecki to intervene in the struggle over the gun, surrendered the weapon to a third party, Mr. Martinez, and ran from the scene and hid in the bushes when Mr. Martinez gained control of the weapon.

Defendants filed a joint Motion for Partial Summary Judgment based on qualified immunity. (Docket No. 27). Following a hearing, this Court denied the motion. Defendants appealed, and the Tenth Court rendered its unpublished decision. As I interpret the Tenth Circuit's instructions, I am solely to consider whether Plaintiff Radecki has alleged conduct or presented genuine issues of material fact as to conduct amounting to a constitutional violation under that Court's decision in *Uhlrig v. Harder*, which was decided more than a year after I denied Defendants' Motion for Partial Summary Judgment based on qualified immunity.[2] However, I will also re-address the issue of the status of the law on whether Defendant Barela could be liable under section 1983 to Mr. Radecki for the acts of Mr. Martinez.

II. Factual Background

I adopt the Tenth Circuit's rendition of the facts. These facts are basically undisputed and are as follows:

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[2] As noted above, this Court denied both Defendants' Motion for Partial Summary Judgment based on qualified immunity on August 3, 1994. *Uhlrig* became the law of this circuit on August 30, 1995.

At approximately 3:00 a.m. on the morning of August 8, 1992, Chester Radecki awoke to the sound of a woman screaming outside his bedroom window in Santa Fe, New Mexico. Mr. Radecki looked out the window and heard more screaming and the sound of someone walking around outside. Shortly thereafter, a law enforcement vehicle arrived nearby with its lights flashing. Mr. Radecki left his home, got into his car, and drove to where Officer Barela, a deputy sheriff, was investigating an incident in which a motorcycle had been driven off Rodeo Road.

A motorcycle lay on the side of the road. Eric Trujillo drove up in a tow truck. Defendant Barela detected a man in the bushes and in the light from his flashlight recognized him as Daniel Martinez. Mr. Martinez staggered out of the bushes. Mr. Martinez, who appeared intoxicated, told Defendant Barela and Mr. Trujillo that his girlfriend had run him off the road, causing him to crash. Defendant Barela began to look around the area for other vehicles or injured persons.

Mr. Radecki arrived, wearing a bathrobe and carrying a flashlight. Mr. Radecki told Defendant Barela that he lived nearby and that he had heard screams, as if a woman were being raped. Defendant Barela and Mr. Radecki explored the scene with their flashlights.

When Defendant Barela shined his flashlight on a car in the bushes, Mr. Martinez tried to grab the officer's nine-millimeter semiautomatic pistol. The two men wrestled for control of the gun. Defendant Barela yelled to Mr. Radecki, "Hit him with your flashlight. Hit him. Get him off me."

It is unclear whether Mr. Radecki hit Mr. Martinez with his flashlight. In response to Defendant Barela's words, however, Mr. Radecki approached the struggling pair. At that point, Mr. Martinez wrestled the gun away from Defendant Barela. Defendant Barela fled to the bushes. Mr. Martinez turned and shot Mr. Radecki in the chest, killing him.

ANALYSIS

I. Establishing a Due Process Claim under the "Shock the Conscience" Standard

As noted in the Tenth Circuit's opinion, Plaintiff Radecki has alleged that Defendant Barela violated his Fourteenth Amendment right to substantive due process by recklessly creating a dangerous situation involving Mr. Radecki and then failing to protect Mr. Radecki from a third party resulting in his death.[3] As I read *Hinton v. City of Elwood*, 997 F.2d 774 (10th Cir.1993), at this juncture this Court must conduct an analysis to determine whether Plaintiff Radecki has alleged a violation of *existing law* as required by the first prong of Plaintiffs' summary judgment burden. This analysis must necessarily incorporate the Tenth Circuit's reasoning in *Uhlrig v. Harder*. The pertinent law in this area is as follows.

The Supreme Court in *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 197, 109 S.Ct. 998, 1003,

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[3] *See also* Plaintiffs' Am. Compl. ¶ 19 (Docket No. 38).

103 L.Ed.2d 249 (1989), concluded that as a general matter, a state's failure to protect an individual against private violence does not constitute a violation of the Due Process Clause. The Due Process Clause of the Fourteenth Amendment was intended "to protect the people from the State, not to ensure that the State protected them from each other. *Id.* at 196, 109 S.Ct. at 1003.[4] But, the Tenth Circuit in *Medina v. City and County of Denver*, 960 F.2d 1493, 1499 (10th Cir.1992) stated that:

> it cannot be said as a matter of law that a policeman can never be liable for the actions of a suspect, although cases in which liability is imposed will be relatively rare. As detailed earlier in this opinion, an officer might be found liable if a fleeing suspect's conduct is sufficiently predictable and is directly and immediately linked to the officer's conduct and if the officer's decision to pursue or continue to pursue the suspect was unreasonable under the circumstances.

The *Medina* Court concluded that recklessness may give rise to a section 1983 claim based on the Due Process Clause. However, for purposes of section 1983, it is not adequate to show that the defendant merely acted recklessly in disregard of a known risk to the public at large. *Id.* at 1496. Rather, the defendant's conduct must be directed toward the plaintiff. *Id.* The Court noted that the defendant's reckless conduct may be considered to be directed toward the plaintiff if the plaintiff is closely and

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[4] The Tenth Circuit has interpreted *DeShaney* as carving out two exceptions to this rule: (1) the special relationship doctrine; and (2) the "danger creation" theory. *Uhlrig*, 64 F.3d at 572.

immediately tied to the perceived substantial risk. *Id.* The Court stated four prerequisites which must be present before reckless conduct can be considered directed toward the plaintiff:

> (1) the plaintiff is a member of a limited and specifically definable group, (2) the defendant's conduct specifically put the members of that group at substantial risk of serious, immediate, and proximate harm, (3) the risk was obvious or known, and (4) the defendant acted recklessly in conscious disregard of that risk.

Id. The Court also noted that an act is reckless when it reflects a wanton or obdurate disregard or complete indifference to risk, for example "when the actor does not care whether the other person lives or dies, despite knowing that there is a significant risk of death" or grievous bodily injury. *Id.* (citations omitted).

In its August 3, 1994, Order, this Court found that Plaintiffs met these four prerequisites. Subsequently, in *Uhlrig*, the Tenth Circuit added a fifth element to the *Medina* test. The fifth element requires that the state's conduct, when viewed in total, shocks the conscience. *Uhlrig*, 64 F.3d at 574. In order for a state to be held liable under section 1983 for creating a danger when someone other than a state actor causes the injury, "a plaintiff must allege a constitutionally cognizable danger" which ultimately rests on reckless or intentionally "injury-causing state action which 'shocks the conscience.' " *Id.* at 572. The *Uhlrig* Court turned to the Supreme Court decision of *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), for guidance in considering the scope of substantive due process violations. *Id.* at 573

Uhlrig cited *Collins* for the proposition that the standard for judging a substantive due process claim is whether the challenged government action would " 'shock the conscience' of federal judges." *Id.* The Court admitted that the level of conduct required to satisfy this additional requirement cannot be precisely defined. It stated:

> [T]o satisfy the "shock the conscience" standard, a plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power. That is, the plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking. The level of conduct required to satisfy this additional requirement cannot precisely be defined, but must necessarily evolve over time from judgments as to the constitutionality of specific government conduct. We do know, however, that the "shock the conscience" standard requires a high level of outrageousness because the Supreme Court has specifically admonished that a substantive due process violation requires more than an ordinary tort and that merely allowing unreasonable risks to persist . . . is not necessarily conscience shocking.

Id. at 574 (citing *Collins*, 503 U.S. at 128, 112 S.Ct. at 1070). *Uhlrig* further stated that it is not enough to show that the state increased the harm of danger from third persons; the plaintiff must also show that the state acted with the requisite degree of culpability in failing to protect the plaintiff. *Id.* at 573 (citations omitted).[5]

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[5] Plaintiffs in their Amended Complaint alleged that "[t]he

Uhlrig states that to "shock the conscience" means the conduct must involve a degree of outrageousness and a magnitude of potential or actual harm that is truly "conscience shocking." *Id.* at 574 (emphasis added). In other words, it uses the term to define itself, which is circular reasoning. An effort to find guidance as to the meaning of this term in the opinions of other circuit courts is unproductive. In general, it appears that district courts are grappling to apply this amorphous and imprecise standard without meaningful direction. *See Smith v. Lexington Fayette Urban County Gov't*, 884 F.Supp. 1086, 1090 (E.D.Ky.1995) (acknowledging Supreme Court's holding in *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) that conduct that "shocks the conscience" violated substantive due process, and noting that "*Rochin* provided no guidelines as to the type of conduct that would be deemed to be a constitutional violation").

A review of the *Collins* case shows that the "shock the conscience" standard is used interchangeably with "arbitrary." *Collins*, 503 U.S. at 128, 112 S.Ct. at 1070 (city's conduct cannot "properly be characterized as arbitrary, or

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combined actions of Defendants . . . which resulted in the injuries to and the death of Mr. Radecki constituted **outrageous conduct** for persons who are governmental officials or entities . . . " (Am.Compl. ¶ 31)

conscience shocking, in a constitutional sense").[6] I read *Collins* to say that arbitrary behavior is the same as shocking behavior. Arbitrary is defined as despotic and tyrannical. *Black's Law Dictionary* 104 (6th ed.1990). If this definition is used, it would be a better test than the "shock the conscience" standard. This is a more meaningful standard. It is more specific and it satisfies the analysis that *Uhlrig* seems to require.

The "shock the conscience" standard on the other hand is very difficult to apply. It is fundamentally a factual inquiry: how outrageous was the defendant's conduct? Because it is so subjective, its application will change as one federal judge after another struggles to apply it. As noted by Justice Douglas in his concurring opinion in *Rochin v. California*, 342 U.S. 165, 179, 72 S.Ct. 205, 213, 96 L.Ed. 183 (1952), "the rule turn[s] not on the Constitution, but on the idiosyncrasies of the judges who sit here." The unpredictability of this test is compounded by the fact that my best measured (and yet idiosyncratic) judgment as a district judge may be summarily supplanted by the collective consciences and judgments of three (idiosyncratic) Tenth Circuit judges. Unfortunately, this amorphous and subjective standard easily lends itself to result-oriented decisions. *See Abeyta v. Chama Valley Indep. Sch. Dist. No. 19*, 77 F.3d 1253 (10th Cir.1996). The Tenth Circuit, however, requires me to make a determination of whether Defendant Barela's conduct is conscience

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[6] For a detailed analysis on the use of these two terms synonymously, see the dissenting opinion of Circuit Judge Cowen in *Fagan v. City of Vineland*, 22 F.3d 1296, 1312 (3rd Cir.1994) (en banc) (Cowen, J., dissenting).

shocking under *Uhlrig*. The only guidance I found in *Uhlrig* seems to say that Defendant Barela's conduct must be of "a high level of outrageousness" coupled with a "magnitude of . . . actual harm" that is "truly conscience shocking." *Uhlrig*, 64 F.3d at 574. I proceed to evaluate the facts of this case under this analysis.

Defendant Barela, a deputy sheriff trained in law enforcement, commanded the help of Mr. Radecki, a civilian dressed in a bathrobe, to subdue a suspect by telling Mr. Radecki to "hit him. Get him off of me." This command made Mr. Radecki the member of a limited and specifically definable group. Defendant Barela directed Radecki to assist him during his struggle with a third party suspect over his gun. The presence of a loaded deadly weapon specifically put Mr. Radecki at obvious and substantial risk of serious, immediate, and proximate harm, which Defendant Barela must have known. Defendant Barela's instructions for Mr. Radecki to engage in the struggle reflects an "intent to place a person unreasonably at risk of harm." *Uhlrig*, 64 F.3d at 573. Once Mr. Martinez gained possession of the gun, Defendant Barela recklessly acted in conscious disregard of this risk to Mr. Radecki when he abandoned Mr. Radecki and hid in the bushes. There are no facts in the record that Defendant Barela made any efforts to protect Mr. Radecki. Once Defendant Barela fled the scene, the suspect turned and shot Mr. Radecki in the chest, killing him. Mr. Martinez' conduct, once he overcame Defendant Barela, was sufficiently predictable and was directly and immediately linked to Defendant Barela's conduct because Defendant Barela did nothing to prevent the act of violence or to

protect Mr. Radecki after commanding Mr. Radecki to hit Mr. Martinez and to get Mr. Martinez off him.

Looking at the conduct of Defendant Barela as a whole, I conclude that his conduct created a special danger to Mr. Radecki, that such conduct was despotic and tyrannical, and therefore, conscience shocking. Defendant Barela's conduct is highly outrageous given the magnitude of harm he placed Mr. Radecki. A police officer has a duty to protect people, not vice versa. No police officer should command a citizen to rescue him from a dangerous situation, thereby putting the citizen's life at risk, and then abandon the citizen to save himself, thereby sacrificing the citizen to seek safety for himself. This is a factor I have considered in reaching my conclusion in this issue. I believe any enlightened person in a civilized society which employs police protection would reach this conclusion. Therefore, Plaintiffs' allegations rise to the level of substantive due process claim, even under *Uhlrig*, and I conclude, as a matter of law, that Defendant Barela's conduct as a whole shocks the conscience.

II. Clearly Established Law

On remand, Defendants argue that even if Plaintiffs have alleged a violation of existing law, the alleged conduct did not violate clearly established law of which a reasonable person would have known. Pursuant to *Hinton v. City of Elwood*, 997 F.2d 774 (10th Cir.1993), it is incumbent upon this Court to analyze the law at the time of the alleged conduct in order to determine whether Defendant Barela's conduct, when perpetrated, violated clearly established law.

This incident occurred on August 8, 1992. In March of 1992, *Medina* established that a police officer could be liable under section 1983 for an injury caused not by the officer but by the suspect being chased by the officer. In explaining how an officer may be found liable, the *Medina* court cited the language in *Schatz v. Cutler*, 395 F.Supp. 271, 274-75 (D.C.Vt.1975): "[w]here there is likelihood of harm from an intentional or reckless act of an outsider, the actor who creates the situation of danger may be held responsible for the act of the immediate wrongdoer." 960 F.2d at 1499 (citation omitted) (alteration in original). Furthermore, *Medina* cited three cases that "suggest a police officer or municipality might be liable for the actions of a third party." 960 F.2d at 1499. These cases are *Wood v. Ostrander*, 851 F.2d 1212 (9th Cir.1988), *modified on reh'g*, 879 F.2d 583 (9th Cir.1989), *cert. denied*, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990); *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir.1987), and *Timko v. City of Hazleton*, 665 F.Supp. 1130 (M.D.Pa.1986). As discussed at length above, there was a high likelihood of harm from Mr. Martinez. Also, Defendant Barela created a situation of danger when he commanded Mr. Radecki to help him during his struggle over his gun and when he fled the scene without protecting Mr. Radecki after Mr. Martinez obtained control of the gun. I conclude that *Medina* is sufficient law to establish that Defendant Barela could be held responsible for Mr. Martinez' conduct.

III. Factual Correspondence

Defendants argue that even if the law were clearly established, the facts of this case must substantially correspond to the prior law establishing that Defendant's

actions were clearly prohibited, citing to *Romero v. Fay*, 45 F.3d 1472, 1475 (10th Cir.1995). Defendants state that there is a lack of substantial correspondence in *Medina*'s facts of a high speed chase and the facts of this case. (Defs.' Mem. Remand at 21.)

Defendants misplace the level of correspondence necessary to hold Defendant Barela responsible for his actions. "Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987). In *Medina*, the Tenth Circuit determined that it had to examine whether it was clearly established at the time of the incident "within a sufficiently analogous factual setting" that the particular conduct of the police officers could be grounds for a section 1983 violation. 960 F.2d at 1497. As stated earlier, the *Medina* court referenced *Wood v. Ostrander* in making the statement that "most of the cases suggest a police officer . . . might be liable for the actions of a third party." 960 F.2d at 1499. In *Uhlrig*, the Tenth Circuit labeled *Wood* "the classic case of state actors creating a danger so as to give rise to § 1983 liability . . . " *Uhlrig*, 64 F.3d at 572. In *Wood*, a state trooper left a woman alone without a car at 2:30 a.m. in a high crime area after he arrested the driver and had the vehicle she was riding in impounded. 879 F.2d at 586. An unknown man from whom she accepted a ride after turning down three or four others raped her. *Id.* The *Wood* court concluded that the trooper involved in the case would not be entitled to

qualified immunity if he acted as the woman claims he did. *Id.* at 595. The Tenth Circuit subsequently summarized the essence of the trooper's conduct in *Wood* as the abandonment of a passenger to fend for herself in a dangerous situation. *Liebson v. New Mexico Corrections Dep't*, 73 F.3d 274, 278 (10th Cir.1996).

The facts of this case are factually analogous to the facts of *Wood*. In each instance, a law enforcement officer abandoned a citizen to fend for him/herself after creating the dangerous situation of dealing with a third party. The 1988 case of *Wood*, cited in 1992 by *Medina*, is sufficiently analogous factually to have placed a reasonable officer in Defendant Barela's position on notice that his command to Mr. Radecki created a danger for Mr. Radecki and his subsequent abandonment of Mr. Radecki, leaving him at the hands of a dangerous suspect, violated Mr. Radecki's constitutional rights.

For the reasons set forth above, Defendants' Motion for Partial Summary Judgment based on qualified immunity (Docket No. 27) shall be denied. Defendants are not entitled to the defense of qualified immunity. An Order in accordance with this Memorandum Opinion shall be entered accordingly.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SUSAN RADECKI, Individually and as Personal Representative of the Estate of Chester A. Radecki, Deceased; KRISTIN RADECKI; KERRY RADECKI; RENEE RADECKI; ROBERT RADECKI,	)	
Plaintiffs-Appellees,	)	No. 94-2185
vs.	)	(D.C. No. CIV 93-1488 LH)
RON BARELA, Personally and in his official capacity; BENJIE MONTANO, Personally and in his Official Capacity,	)	(D. N.M.)
Defendants-Appellants.	)	

ORDER AND JUDGMENT*
(Filed Feb. 16, 1996)

Before BALDOCK, BRISCOE, and MURPHY, Circuit Judges.

Defendant Ron Barela appeals the district court's denial of his motion for summary judgment based on

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

qualified immunity. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and remand to the district court for further proceedings.

The record before us reveals the following facts. At approximately 3:00 a.m. on the morning of August 8, 1992, Chester Radecki awoke to the sound of a woman screaming outside his bedroom window in Santa Fe, New Mexico. Mr. Radecki looked out the window and heard more screaming and the sound of someone walking around outside. Shortly thereafter, a law enforcement vehicle arrived nearby with its lights flashing. Mr. Radecki left his home, got in his car, and drove to the scene.

Defendant Barela, a deputy sheriff with the Santa Fe County, New Mexico, Sheriff's Department, arrived on the scene. A motorcycle lay on the side of the road. Eric Trujillo drove up in a tow truck. Defendant Barela detected a man in the bushes, and with his flashlight recognized him as Daniel Martinez. Mr. Martinez staggered out of the bushes.

Mr. Martinez, who appeared intoxicated, told Defendant Barela and Mr. Trujillo that his girlfriend had run him off the road, causing him to wreck. Defendant Barela began to look around the area for other vehicles or injured persons.

Mr. Radecki arrived in a robe carrying a flashlight. Mr. Radecki told Defendant Barela that he lived nearby, and that he heard screams, as if a woman was being raped. Defendant Barela and Mr. Radecki explored the scene with their flashlights.

When Defendant Barela shined his flashlight on a car in the bushes, Mr. Martinez tried to grab the officer's nine millimeter semiautomatic pistol. The two men wrestled for control of the gun. Defendant Barela yelled to Mr. Radecki, "Hit him with your flashlight. Hit him. Get him off me."

It is unclear whether Mr. Radecki hit Mr. Martinez with his flashlight. In response to Defendant Barela's words, however, Mr. Radecki approached the struggling pair. At that point, Mr. Martinez wrested the gun away from Defendant Barela. Defendant Barela fled to the bushes. Mr. Martinez turned and shot Mr. Radecki in the chest, killing him.

Plaintiff Susan Radecki, appearing as personal representative of the estate of Mr. Radecki, filed this action in the district court against Defendant Barela under 42 U.S.C. § 1983. Plaintiff alleged, *inter alia*, that Defendant Barela violated Mr. Radecki's Fourteenth Amendment right to substantive due process by recklessly creating the dangerous situation that culminated in Mr. Radecki's death. Specifically, Plaintiff alleged that Defendant Barela violated Mr. Radecki's substantive due process rights by increasing Mr. Radecki's vulnerability to harm by a third party when Defendant Barela ordered Mr. Radecki to intervene in the struggle over the gun, surrendered the weapon to Mr. Martinez, and hid in the bushes when Mr. Martinez gained control of the weapon.

Defendant Barela moved for summary judgment based on qualified immunity. After a hearing, the district court denied Defendant Barela's motion for summary judgment. This appeal followed.

Defendant Barela asserts the district court erred in denying his motion for summary judgment based on qualified immunity. Defendant Barela contends that Plaintiff failed to allege conduct that demonstrates he acted with the requisite reckless intent to violate Mr. Radecki's substantive due process rights by creating a dangerous situation wherein Mr. Martinez injured Mr. Radecki.[1]

"Qualified immunity protects public officials from individual liability in a § 1983 action unless the officials violated 'clearly established . . . constitutional rights of which a reasonable person would have known.' " *Workman v. Jordan*, 32 F.3d 475, 478 (10th Cir. 1994) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The plaintiff initially bears a heavy two-part burden when the defendant pleads the defense of qualified immunity. *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir. 1995). The plaintiff must show (1) "that the defendant's actions violated a constitutional or statutory right," and (2) that the right "allegedly violated [was] clearly established at the time of the conduct at issue." *Id.* We review the district court's

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[1] Defendant Barela also argues the district court erred in denying him qualified immunity because: (1) the law was not clearly established that he could be liable under § 1983 to Mr. Radecki for acts of a third party, and (2) *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 (1989) bars Plaintiff's suit. We express no opinion regarding these arguments in light of our decision to remand for the district court to consider Defendant Barela's motion for summary judgment based on qualified immunity under *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995).

qualified immunity determination at the summary judgment stage de novo, viewing the evidence in the light most favorable to the nonmoving party. *Romero v. Fay*, 45 F.3d 1472, 1475 (1995).

The district court analyzed Plaintiff's claim that Defendant Barela violated Mr. Radecki's Fourteenth Amendment substantive due process rights under *Medina v. City and County of Denver*, 960 F.2d 1493 (10th Cir. 1992). In *Medina*, we ruled that a state actor may be liable under § 1983 for violating an individual's substantive due process rights if the state actor recklessly creates a danger that culminates in injury to the individual, although a third party, and not the state actor, actually inflicts the harm upon the individual. *See id.* at 1495-96. In so doing we recognized a "danger creation theory" exception to the rule that the Due Process Clause of the Fourteenth Amendment was intended "to protect people from the State, not to ensure that the State protected them from each other." *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 196 (1989). A state is liable under § 1983 and the "danger creation theory," however, only if the state actor recklessly created the danger that caused the constitutional violation and the state actor directed his or her conduct toward the plaintiff. *Medina*, 960 F.2d at 1496. In *Medina*, we determined:

> that reckless conduct can be considered directed toward the plaintiff if (1) the plaintiff is a member of a limited and specifically definable group, (2) the defendant's conduct specifically put the members of that group at substantial risk of serious, immediate, and proximate harm, (3) the

> risk was obvious or known, and (4) the defendant acted recklessly in conscious disregard of that risk.

Id.

Applying *Medina*, the district court in the instant case ruled that Plaintiff alleged facts that demonstrated that Defendant Barela acted with the reckless conduct necessary to violate Mr. Radecki's substantive due process rights under the "danger creation theory." The district court determined that by ordering Mr. Radecki to hit Mr. Martinez with his flashlight, Defendant Barela acted recklessly and in conscious and unreasonable disregard of the consequences of his act, thereby creating the danger that harmed Mr. Radecki. Thus, the district court ruled that Plaintiff alleged conduct that amounted to a constitutional violation under *Medina*.

While this appeal was pending, however, we ruled in *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir.1995) that to prevail on a substantive due process claim, a plaintiff "must demonstrate that the state acted in a manner that 'shocks the conscience.' " *Id.* at 571 (quoting *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 126 (1992) (quotation and alteration omitted)). In *Uhlrig*, we attempted to define conduct which "shocks the conscience:"

> [T]o satisfy the "shock the conscience" standard, a plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power. That is, the plaintiff must demonstrate a degree of outrageousness

and a magnitude of potential or actual harm that is truly conscience shocking.

Uhlrig, 64 F.3d at 574.

Merging *Medina* with the "shocks the conscience" standard, we held in *Uhlrig* that in order for a state to be held liable under § 1983 for creating a danger where someone other than a state actor injures the plaintiff, the plaintiff must demonstrate that:

(1) the plaintiff was a member of a limited and a specifically definable group;

(2) the defendant's conduct put the plaintiff and other members of that group at substantial risk of serious, immediate and proximate harm;

(3) the risk was obvious or known;

(4) the defendant acted recklessly in conscious disregard of that risk; and

(5) such conduct, when viewed in total, is conscience shocking.

Id. at 574.

The district court denied Defendant Barela's motion for summary judgment based on qualified immunity on August 2, 1994. *Uhlrig* became the law of this circuit on August 30, 1995. The district court, therefore, did not have the benefit of *Uhlrig* when it analyzed Defendant Barela's motion for summary judgment. More specifically, the district court did not determine whether Plaintiff alleged conduct which "shocks the conscience" in support of Plaintiff's claim that Defendant Barela violated Mr. Radecki's substantive due process rights by creating

the danger which led to his death. Nor have the parties briefed *Uhlrig* or the "shocks the conscience" standard as applied to the facts of the instant case. We think it prudent in light of the fact-specific qualified immunity inquiry and the unique facts of this case to remand this case to the district court to apply *Uhlrig*. Consequently, we REMAND to the district court with instructions to: (1) VACATE its order denying Defendant Barela qualified immunity, and (2) consider whether Plaintiff Radecki has alleged conduct or presented genuine issues of material fact as to conduct constituting a constitutional violation under *Uhlrig*. On remand, the parties are entitled to supplement the record with material bearing on the issue of whether Defendant Barela's alleged conduct "shocks the conscience" of the court.

Entered for the Court

Bobby R. Baldock
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SUSAN RADECKI, et al.,

Plaintiffs,

vs. No. CIV 93-1488 LH/DJS

RON BARELA, personally, and in his official capacity, and BENJIE MONTANO, personally and in his official capacity,

Defendants.

(Filed Aug. 3, 1994)

ORDER REGARDING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER having come before the Court upon Defendants' Motion for Partial Summary Judgment, the Court having reviewed and considered the materials submitted by the parties, hearing having been held on July 21, 1994 with Plaintiffs represented by their counsel, Robert R. Rothstein, and Defendants represented by Joseph F. Canepa, and this Court having made oral findings and conclusions on the record in support of its ruling;

IT IS THEREFORE ORDERED that Defendants' motion is granted in part and denied in part. More specifically, Defendants' motion is GRANTED in regard to the Title 42 U.S.C. §1983 claims brought by Plaintiffs Susan Radecki, Kristin Radecki, Kerry Radecki, Renee Radecki and Robert Radecki, individually, claiming that their right to intimate familial association was deprived by

Defendants. Judgment is hereby entered in Defendants' favor and against those Plaintiffs on that claim alone.

IT IS FURTHER ORDERED that Defendants' motion is DENIED insofar as it seeks the entry of summary judgment in Defendants' favor in regard to the Title 42 U.S.C. §1983 claims brought by Plaintiff Susan Radecki in her capacity as Personal Representative of the Estate of Chester A. Radecki, deceased.

IT IS FURTHER ORDERED that Defendants' motion is DENIED insofar as it seeks the entry of summary judgment in their favor based upon their affirmative defense alleging that Defendants are entitled to qualified immunity from suit.

This Ruling does not address Plaintiffs' state law claims (which were not the subject of Defendants' motion) nor does it address that portion of Defendants' motion which sought summary judgment in regard to the Estate's Title 42 U.S.C. §1983 claims against Defendant Benjie Montano based upon theories of supervisory and governmental entity liability. That portion of Defendants' motion has been held in abeyance pending further discovery and briefing by stipulation of the parties.

DONE this ___ day of AUG 2 1994, 1994 at Albuquerque, New Mexico.

/s/ C. LeRoy Hansen
UNITED STATES DISTRICT JUDGE

APPROVED AND SUBMITTED BY:

/s/ Lisa Chau for
Robert R. Rothstein
Attorney for Plaintiffs

APPROVED AS TO FORM:

/s/ Joseph F. Canepa for defendants
Joseph F. Canepa
Attorney for Benjie Montano

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SUSAN RADECKI, Individually and as Personal Representative of the Estate of Chester A. Radecki, Deceased; KRISTIN RADECKI; KERRY RADECKI; RENEE RADECKI; and ROBERT RADECKI,	)	
Plaintiffs-Appellees,	)	No. 96-2297
v.	)	
RON BARELA, personally and in his official capacity; and BENJIE MONTANO,	)	
Defendants-Appellants.	)	

ORDER

Filed July 28, 1998

Before **TACHA, McWILLIAMS** and **BALDOCK,** Circuit Judges.

Appellees' petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active

service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Illegible
Deputy Clerk

UNITED STATES CODE ANNOTATED

TITLE 42

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(As amended Pub.L. 104-317, Title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

U.S. CONSTITUTION AMENDMENT XIV – CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male

citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

New Mexico Statutes Annotated, 1978 (1994 Repl. Pamp.)

30-22-2. Refusing to aid an officer.

Refusing to aid an officer consists of refusing to assist any peace officer in the preservation of the peace when called upon by such officer in the name of the United States or the state of New Mexico.

Whoever commits refusing to aid an officer is guilty of a petty misdemeanor.

Supreme Court, U.S.
FILED
DEC 17 1998
OFFICE OF THE CLERK

No. 98-692

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SUSAN RADECKI, Individually and as Personal Representative of the Estate of Chester A. Radecki, Deceased, KRISTIN RADECKI, KERRY RADECKI, RENEE RADECKI and ROBERT RADECKI,

Petitioners,

vs.

RON BARELA, personally and in his official capacity and BENJIE MONTANO, personally and in his official capacity,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Did the United States Court of Appeals for the Tenth Circuit correctly apply *County of Sacramento v. Lewis*, __ U.S. __, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) in determining that a police officer, who had been suddenly assaulted by a suspect, did not violate the Fourteenth Amendment's guaranty of substantive due process by saying to a bystander holding a large flashlight, "Hit him with your flashlight. Hit him. Get him off me," while engaged in a life and death struggle with the suspect for control of the police officer's gun?

If such conduct by the police officer constituted a constitutional violation, was the law clearly established in August 1992 that a police officer's request for help from a bystander, when the officer is suddenly attacked by a suspect, would violate the constitutional rights of the bystander?

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Respondents respectfully pray that this Court deny the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled action on June 24, 1998.

STATEMENT OF THE CASE

A. Background

Following this Court's recent articulation in *County of Sacramento v. Lewis*, __ U.S. __, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998), of the degree of culpability necessary to maintain a substantive due process claim, the Court of Appeals properly reversed the District Court's denial of Respondent Ron Barela's summary judgment motion based on qualified immunity in this action brought pursuant to 42 U.S.C. § 1983. The Court of Appeals determined that *Lewis*, which clarified the degree of culpability required to meet the conscience-shocking standard, controlled the resolution of the issues in this case. The Court of Appeals' decision conforms with this Court's decisions pertaining to substantive due process claims brought against governmental workers deployed in emergency situations. The Court of Appeals' decision also conforms with the application of *Lewis* by other circuits. The conflict alleged by Petitioner among the circuits existed prior to this Court's clarification of the law in *Lewis* and appears, to a large degree, to have been resolved by *Lewis*. As the law established in *Lewis* is clear and the Court of Appeals' application of *Lewis* was proper, the Petition should be denied.

B. Facts

Petitioners have misstated the facts of this case in at least four ways. First. although Deputy Barela requested Mr. Radecki to hit the suspect, Daniel Martinez, on the head, it is not known

whether he did so or not. The trial testimony of Eric Trujillo, the tow truck driver who had a clear view of the entire event and all participants, states that Mr. Radecki never hit Daniel Martinez with the flashlight. Deputy Barela also stated that Mr. Radecki never hit Daniel Martinez with the flashlight. Nevertheless, for purposes of Respondents' motion for summary judgment, Petitioners conceded that whether Mr. Radecki hit Daniel Martinez or not, "is not determinative of the outcome" of the summary judgment motion and Respondents were willing, *arguendo*, to accept Petitioners' allegation as true.[1] Both the Court of Appeals and the District Court in their recitation of the facts agreed that it was unclear whether Mr. Radecki hit Daniel Martinez with his flashlight.[2] App. 3a, 18a, and 31a. Second, Deputy Barela never used Mr. Radecki as a "human shield" as claimed by Petitioners in their Petition. Pet. 15. This assertion appears for the first time in the Petition and certainly, at best, is an exaggeration of the facts.

Third, Petitioners omit the fact that when he realized he was losing the fight and control of his weapon, Deputy Barela yelled at Mr. Radecki to run, thus affording a warning. Mr. Radecki was unrestrained and free to run. Unfortunately, he did not heed the warning. Finally, Petitioners in their "question presented" and argument give the impression that Deputy Barela

1. Issues of fact which are not material to the substantive claim do not preclude summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (only issues which "might affect the outcome of the suit under governing law" will preclude summary judgment).

2. For their contention that Mr. Radecki hit Daniel Martinez with the flashlight, Petitioners rely on the testimony of Leroy Padilla regarding a telephone conversation he had with Daniel Martinez some time after the event and the testimony of Susan Radecki who was not present at the scene. Padilla never clearly said Mr. Radecki hit Martinez, and his testimony is incompetent hearsay.

voluntarily surrendered his gun to Daniel Martinez. Daniel Martinez obtained Deputy Barela's gun only after jumping him suddenly and wrestling it away from him. It was during this fight for the control of the gun that Deputy Barela asked Mr. Radecki to hit Daniel Martinez on the head with the flashlight. Petitioners have recognized that Mr. Radecki was already in danger as a witness at a crime scene. Petitioners also have acknowledged that had Deputy Barela not spoken to Mr. Radecki at all, they clearly would have no constitutional claim.

Respondents incorporate by reference the Statement of the Facts set forth in the Court of Appeals Opinion below.

REASONS FOR DENYING THE WRIT

The decision below was a plainly correct application of *Lewis* and no conflict among the circuits currently exists.

I.

THE COURT OF APPEALS' DECISION PROPERLY APPLIES THE LAW OF *LEWIS*.

In arguing for the reversal of the Court of Appeals' decision, Petitioners also appear to be arguing for the reversal of *Lewis*. Petitioners quote extensively from the District Court's decision which was entered before *Lewis* was decided and, therefore, did not employ the analytical frame work set forth in *Lewis*. The District Court struggled to apply the "shock the conscience" standard to the facts of this case.

Realizing that under *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995), *cert. denied*, 516 U.S. 1118, 116 S. Ct. 924, 133 L. Ed. 2d 853 (1996), it needed to determine whether the conduct of Deputy Barela met the "shock the conscience"

standard, the District Court complained that the standard was amorphous, very difficult to apply, and subjective. App. 23a. The District Court wrote:

> It is fundamentally a factual inquiry: how outrageous was the defendant's conduct? Because it is so subjective, its application will change as one federal judge after another struggles to apply it. . . . The unpredictability of this test is compounded by the fact that my best measured (and yet idiosyncratic) judgment as a district judge may be summarily supplanted by the collective consciences and judgments of three (idiosyncratic) Tenth Circuit judges. Unfortunately, this amorphous and subjective standard easily lends itself to result-oriented decisions.

App. 23a (*citations omitted*). Without *Lewis* as a guide, the District Court equated the "shocks the conscience" standard with "despotic and tyrannical" behavior. App. 22a-23a. The only authority relied upon the District Court for its definition was *Black's Law Dictionary*, 104 (6th Ed. 1990). App. 23a. The District Court concluded that Deputy Barela's "conduct was despotic and tyrannical, and therefore, conscience shocking." App. 25a. In spite of finding the standard difficult to apply, the District Court also determined that the law was clearly established at the time. App. 25a-28a. The Court of Appeals reversed the District Court, holding that the conduct of Deputy Barela did not arise to the level of culpability required by *Lewis* to sustain a substantive due process claim.

In *Lewis*, the petitioners argued as the Petitioners argue in the present case that the defendants' actions constituted an abuse of power "unjustified by any legitimate objective of law enforcement" so as to be barred by the Fourteenth Amendment.

Lewis, 118 S. Ct. at 1713. Petitioners in the present case argue that there was no legitimate need for Deputy Barela's conduct. Pet. 15, 16 n.6. Petitioners maintain that the Court of Appeals focused exclusively on the opportunity for deliberation, rather than upon the state interest in permitting the conduct. Pet. 13. An examination of *Lewis* reveals that the Court of Appeals properly applied its holding.

In *Lewis*, a police officer pursued two boys on a motorcycle who had failed to stop in response to the police officer's commands. The officer chased the motorcycle for seventy five seconds over 1.3 miles in a residential neighborhood, causing two cars and a bicycle to swerve off the road. 118 S. Ct. at 1712. The chase ended after the motorcycle tipped over. The patrol car skidded into one of the boys, killing him. *Id.* The only need of the police officer to apprehend the boys was their refusal to stop. 118 S. Ct. at 1713, *quoting County of Sacramento v. Lewis*, 98 F.3d 434, 442 (9th Cir. 1996). The officer acted in violation of the County Sheriff's Department's order regarding police pursuits. 118 S. Ct. at 1712. This Court in *Lewis*, analogizing sudden police chases to prison riots, wrote:

> Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made "in haste, under pressure and frequently without the luxury of a second chance." *Id.*, at 320, 106 S. Ct., at 1086; *cf. Graham v. Connor*, 490 U.S., at 397, 109 S. Ct., at 1872 ("police officers are often forced to make split-second judgments — in

> circumstances that are tense, uncertain, and rapidly evolving").

Lewis, 118 S. Ct. at 1720.

In the present case the suspect, Daniel Martinez, did not merely disobey an order to stop, but assaulted Deputy Barela. Deputy Barela was in hand to hand combat with the suspect, rather than chasing him by car. Deputy Barela was fighting for his life and had even less time for deliberation than an officer in his patrol car deciding to chase a suspect. Both are pursuit cases, but the danger to the police officer in the hand to hand combat situation is more immediate.

This Court in *Lewis* recognized:

> [W]hen unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates "the large concerns of the governors and the governed." . . . Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under Section 1983.

Id. (*citations omitted*). This Court noted that the officer in *Lewis* was faced with a course of lawless behavior for which he was not to blame. He did not cause the boys to speed or to flout the authority of law enforcement officers or encourage them to race through traffic. The precipitating conduct was "practically instantaneous" and the officer's response instinctive. *Lewis*, 118 S. Ct. at 1721. This Court concluded:

> Regardless whether Smith's behavior offended the reasonableness that is held up by tort law or the balance struck in law enforcement's own codes of sound practice, it does not shock the conscience, and petitioners are not called upon to answer for it under Section 1983.

Id.

Just as the officers in *Lewis* had a legitimate interest in apprehending the suspects, Defendant Barela in the present case had a legitimate interest in investigating a crime scene, apprehending Daniel Martinez and winning the fight for control of the gun. Daniel Martinez' actions were as lawless and sudden as the actions of the boys on the motorcycle in *Lewis*. As in *Lewis*, the precipitating conduct of the suspect was practically instantaneous and Deputy Barela's reaction instinctive. The Court of Appeals correctly interpreted the standard set forth in *Lewis*. The Court of Appeals enunciated the *Lewis* standard as follows:

> Henceforth, we look to the nature of the official conduct on the spectrum of culpability that has tort liability at one end. On the opposite, far side of that spectrum is conduct in which the government official intended to cause harm and in which the state lacks any justifiable interest. In emergency situations, only conduct that reaches that far point will shock the conscience and result in constitutional liability. Where the state actor has the luxury to truly deliberate about the decisions he or she is making, something less than unjustifiable intent to harm, such as calculated indifference, may suffice to shock the conscience.

App. 12a. The Court of Appeals properly applied the standard to the facts of this case:

> Deputy Barela was confronted with a suddenly explosive law enforcement situation when Martinez tried to seize Barela's gun with Radecki present. Deputy Barela had no time for deliberation. The undisputed facts in this record make clear that Deputy Barela was confronted with the kind of instantaneous judgment call that is so often required of law enforcement personnel, prison officials, and many other government actors called to emergency situations. Sometimes these decisions are negligent, sometimes they are even reckless, sometimes indifferent. Under these circumstances, however, where Plaintiffs have not even alleged that Deputy Barela acted with an intent to harm the participants or to worsen their legal plight, under the *Lewis* standard there is no constitutional liability.

App. 12a-13a.

Petitioners do not claim that Deputy Barela specifically intended to harm Mr. Radecki. Pet. 18 ("notwithstanding the absence of a specific intent to harm"). Petitioners appear to be advocating a modification of the *Lewis* standard to eliminate the requirement of specific intent to harm in high speed police chase cases and other cases involving emergency situations which do not provide any time for the police officer to deliberate. Petitioners also evidently want courts to focus narrowly on the specific conduct of the police officer, rather than upon the totality of the circumstances, in determining whether the conduct is supported by "any legitimate need." Pet. 18. Such modifications of the *Lewis* standard would once again cause uncertainty and ambiguity in the law. The boys in *Lewis*

refused to stop when commanded to do so by the police officer. Such lawless behavior by the boys supplied sufficient justification for the ensuing police chase. Similarly, in the present case Defendant Martinez' unlawful assault of a police officer justified the ensuing fight and Deputy Barela's desperate plea for help from Mr. Radecki.

Lewis provides a helpful analytical frame work for substantive due process cases. It clarifies the amorphous "shocks the conscience" standard which the District Court in the present case found so difficult to apply. The Court of Appeals properly interpreted and applied the *Lewis* standard. The Petition should be denied.

II.

OTHER CIRCUITS ARE INTERPRETING AND APPLYING *LEWIS* IN THE SAME MANNER AS THE COURT OF APPEALS IN THE PRESENT CASE.

While *Lewis* was decided only recently, it's standard is clear and there appears to be no conflict in the circuits at this time regarding its interpretation and application. In *Schaefer v. Goch*, 153 F.3d 793 (7th Cir. 1998), the Court of Appeals for the Seventh Circuit considered whether the unintentional shooting of a bystander during a standoff between police and the bystander's husband violated the bystander's substantive due process rights. The Seventh Circuit Court of Appeals, citing *Lewis*, recognized that deliberate indifference is not a proper statement of the "conscience - shocking" standard in the context of a high-speed chase, since there is no time for actual deliberation. Although *Schaefer* was not a police chase case, the court determined that the facts were similar to those of *Lewis* in that the police officers "were faced with a dangerous, fluid situation, in which they were forced to make decisions" quickly. *Schaefer v. Goch*, 153 F.3d at 798.

The court in *Schaefer* noted that:

> When government officers face the sort of unforeseen and rapidly changing circumstances that demand unreflective decisions with potentially grave consequences on every side, "even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates [the concerns of substantive due process]."

Id., *quoting Lewis*, 118 S. Ct. at 1720. The *Schaefer* court concluded that although

> firing a gun when an innocent party who has just attempted to surrender is standing, by most accounts, only inches from the intended target seems even more dangerous a course than pursuing a suspect at high speeds through city or suburban streets,

the officers' decision to fire, although regrettable, "[g]iven the high-pressure, life-and-death nature of the standoff" does not shock the conscience. *Id.*, 118 S. Ct. at 798-799. The Seventh Circuit's analysis and application of the *Lewis* standard does not conflict with that of the Tenth Circuit in the present case. *See also Jarrett v. Schubert*, No. 97-2628-GTV, 1998 WL 471992 at 5 (D. Kan. July 31, 1998) ("To help sort through the quagmire, the Supreme Court has adopted a fluctuating standard of review. In emergency situations, a government official will be liable only if he intended to inflict harm on the plaintiff and the government has no justifiable interest in his particular conduct." *Citing Lewis*, 118 S. Ct. at 17-20 and the District Court decision in the present case, 146 F.3d 1227).

The Ninth Circuit Court of Appeals has also interpreted *Lewis* in a manner consistent with the Tenth Circuit Court of

Appeals in the present case. In *Moreland v. Las Vegas Metropolitan Police Department*, __ F.3d __, No. 97-17070, 1998 WL 809551 (9th Cir. Nov. 24, 1998), the plaintiffs alleged that the defendant police officer had inadvertently shot a bystander during a gun fight outside a Las Vegas bar. The court in *Moreland* held that no substantive due process claim under the Fourteenth Amendment arose under the circumstances. In reaching its holding the court in *Moreland* applied the *Lewis* standard. The court stated:

> [T]he argument for application of the "purpose to commit harm" standard is even more compelling [here] than it was in *Lewis*, given the stronger parallels that exist with the prison disturbance context from which this standard was drawn. Indeed, this analogy, which the Supreme Court found "hard to avoid" with respect to police chases, is inescapable in the type of situation addressed here.

1998 WL 809551 at 6 (citation omitted). The *Moreland* court reasoned that the *Lewis* rationale applied "with equal force to the circumstances" faced by the defendant police officer who was responding to a gun fight in progress. *Id.* The police officers were required to act quickly "to address a life-threatening situation." *Id.*

The *Moreland* court noted that its application of *Lewis* conformed with decisions of other circuits. The court wrote:

> [E]ach of the circuits that has interpreted and applied this aspect of the *Lewis* decision has recognized that the critical question in determining the appropriate standard of culpability is whether the circumstances allowed the state actors time to fully consider the potential consequences of their conduct. *See*

> *Armstrong v. Squadrito*, No. 97-2569, 152 F.3d 564, 1998 WL 416887, at 13-20 (7th Cir. July 24, 1998) (applying *Lewis*'s standard of culpability reasoning to a substantive due process claim based on prolonged unlawful detention); *Medeiros v. O'Connell*, No. 97-7355, 150 F.3d 164, 1998 WL 391500, at 6 (2nd Cir. July 15, 1998) (applying *Lewis* in accidental shooting case); *Radecki v. Barela*, No. 96-2297, 146 F.3d 1227, 1998 WL 334490 at 6 (10th Cir. June 24, 1998) (holding that *Lewis*'s "purpose to commit harm" standard applies to all cases involving "emergency situations").

Id. at 7. If the accidental fatal shooting of a bystander in both *Schaefer* and *Moreland* does not "shock the conscience", Deputy Barela's verbal plea to a bystander for help also is not conscience shocking. *See Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) ("[T]here is no constitutional right to be protected by the State against being murdered by criminals and madmen"). As there currently is no conflict among the circuits regarding the *Lewis* standard, the Petition should be denied.

III.

THE PETITION PRESENTS NO ISSUE OF IMPORTANCE OR MAJOR SIGNIFICANCE FOR REVIEW BY THIS COURT.

Essentially the review sought by Petitioners turns solely upon the Court of Appeal's analysis of the particular facts of this case. No legal controversy of importance or direct conflict as to legal issues is presented for review. Petitioners do not contend that an explosive, dangerous situation did not exist or that Deputy Barela intended to harm Mr. Radecki physically, rather they argue that Deputy Barela's conduct was sufficiently

outrageous that it should be considered conscience-shocking in spite of *Lewis*. Petitioners would like to put the clock back to a pre-*Lewis* time when the guidelines for finding a substantive due process violation depended upon a court's subjective view of the level of outrageousness presented. Before *Lewis*, the result often turned upon the phrasing of the issue and the plaintiff's rhetoric. *See* the Memorandum Opinion of the District Court in the present case, App. 23a ("It is fundamentally a factual inquiry: how outrageous was the defendant's conduct?").

Petitioners' yearning for the pre-*Lewis* era is reflected in the cases cited and relied upon by Petitioners. *Pinder v. Johnson*, 54 F.3d 1169, 1178 (4th Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 994, 116 S. Ct. 530, 133 L. Ed. 2d 436 (1995), cited by Petitioners shows the difficulty in assessing the level of outrageousness of the facts. Initially the Fourth Circuit in *Pinder* found an actionable Section 1983 claim had been pled against a municipality and a police officer for releasing from custody the former boyfriend of a mother after a domestic violence arrest, enabling the boyfriend to return and burn down the mother's home killing her children while she was at work. However, after an *en banc* review by the Fourth Circuit, that court withdrew its earlier opinion and concluded that there was "no actionable 1983 claim", because no duty to protect existed in those circumstances and the law was not clearly established. In a clearly difficult decision, the Court wrote,

> It cannot be that the state "commits an affirmative act" or "creates a danger" every time it does anything that makes injury at the hands of a third party more likely . . . no amount of semantics can disguise the fact *that the real "affirmative act" here was committed by Pittman, not by Officer Johnson.*

54 F.3d at 1175 (emphasis added). So too here, the real "affirmative act" was Daniel Martinez shooting Mr. Radecki in cold blood after he won the struggle for Deputy Barela's gun, not Deputy Barela's cry for help during that struggle.

Petitioners ignore that Deputy Barela had no time to deliberate. They cite to pre-*Lewis* cases in which the defendants acted in non-emergency settings. *See, e.g., Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938, 111 S. Ct. 341, 112 L. Ed. 2d 305 (1990) (police officer arrested driver of car, impounded the car and left female passenger alone in the early hours of the morning in a high crime area where she was raped by a third party; applied standard of deliberate indifference); *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), *cert. denied*, 508 U.S. 951, 113 S. Ct. 2442, 124 L. Ed. 2d 660 (1993) (Defendants placed a registered nurse alone with a known violent sex offender who subsequently kidnapped and raped her; applied standard of deliberate indifference); *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (Police officers arrested driver of vehicle and left young children stranded on the roadway; applied standard of gross negligence or reckless disregard). Not only do these cases apply differing standards of culpability, but none of them represent situations where the police officers are forced to make split second judgments in tense, uncertain and rapidly evolving circumstances. *See Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1089).

IV.

THE LAW WAS NOT CLEARLY ESTABLISHED AND RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY.

The Court of Appeals in the present case did not reach the second prong of the qualified immunity analysis established

by *Siegert v. Gilley*, 500 U.S. 226, 231-33, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991). This Court held in *Siegert* that a court should analyze a defense of qualified immunity by determining first whether a deprivation of a constitutional right has been alleged. If the plaintiff has stated a claim for deprivation of a constitutional right, only then should a court determine whether the right implicated was clearly established at the time of the defendant's conduct. The Court of Appeals did not go beyond the first step of *Siegert*. It determined that Petitioners had failed to state a substantive due process claim. If the Court of Appeals were to reach the second step of the qualified immunity analysis, it is likely that the case would still result in judgment for Respondents.

The history of this case amply demonstrates that the law was not clearly established in August of 1992, so that a reasonable police officer in Deputy Barela's place would have known that his conduct was unlawful in light of pre-existing law. *See Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987). In August of 1992, it was clear that a person had no constitutional right to governmental protection from private violence with the exception of certain limited circumstances where the individual has a "special relationship" with the state. *DeShaney v. Winnebego County Dept. of Social Services*, 489 U.S. 189, 109 S. Ct. 998, 1003-4, 103 L. Ed. 2d 249 (1989) ("[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guaranty of certain minimal levels of safety and security.") Approximately four months prior to the incident at issue in the present case, the Tenth Circuit held that a police officer could be liable for injuries to a bicyclist caused by a suspected felon who was being recklessly pursued in an automobile chase by police officers. *See Medina v. City and*

County of Denver, 960 F.2d 1493, 1496 (10th Cir. 1992). *Medina* has now effectively been superceded by *Lewis* and is no longer good law.

While the present case was on appeal for the first time to the Tenth Circuit Court of Appeals, the Court of Appeals decided in *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995), *cert. denied*, 516 U.S. 1118, 116 S. Ct. 924, 133 L. Ed. 2d 853 (1996), that for a plaintiff to prevail on a substantive due process claim against an individual police officer, the plaintiff must demonstrate that the officer acted in a manner that "shocks the conscience." *Id.* at 571. *Uhlrig* followed this Court's reasoning set forth *in Collins v. City of Harker Heights*, 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992). The Court of Appeals remanded this case to the District Court to reconsider whether Deputy Barela's conduct met the "shocks the conscience" standard of *Collins* and *Uhlrig*. The District Court again denied qualified immunity to Deputy Barela, holding that *Medina* clearly established that Deputy Barela's conduct was unconstitutional.

While this case was pending before the Court of Appeals for the second time, this Court decided *Lewis*. Certiorari was granted by this Court in *Lewis* "to resolve a conflict among the circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case." *Lewis*, 118 S. Ct. at 1713. Prior to *Lewis*, the standard of culpability for a substantive due process case was not clearly established either among the circuits or within the Tenth Circuit itself. The pre-*Lewis* law in this area of state-created-danger hardly serves to illuminate the "apparent unlawfulness" of Deputy Barela's single cry for help sufficient to satisfy the particularized articulation requirement of *Anderson v. Creighton*. 483 U.S. at 640. Thus, even if this Court were to grant the Petition and reverse the Court of Appeals, it

is likely that the result would remain the same, for the law was not clearly established. Deputy Barela would still be entitled to qualified immunity.

CONCLUSION

The Petition for Writ of Certiorari should not be granted, therefore, since the Court of Appeals correctly interpreted and applied *Lewis*. Petitioners' argument is essentially a factual dispute regarding the level of outrageousness of the facts which does not warrant review by this Court. The conflict among the circuits over the standard of culpability has largely been resolved by *Lewis*. It is unlikely that the granting of the Petition would change the judgment in favor of Respondents. In any event, Respondents are entitled to qualified immunity as the law was not clearly established at the time.

Respectfully submitted,

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